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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

VITO GIALLO, ANTONINO VALENTI AND JOSEPH C. JULIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. II, 247–253)[1] and dissenting (R. II, 253–259) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1953 (R. II, 259–260). The

[1] "R. II" refers to the gray "Appendix to Appellee's Brief", which is Volume II of the record; "R. I" refers to the blue "Appendix to Appellants' Brief", which is Volume I of the record.

petition for a writ of certiorari was filed on September 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge's examination of witnesses and remarks deprived petitioners of a fair and impartial trial.

2. Whether the trial judge erred in denying petitioners' motion for a mistrial where a government witness on cross-examination volunteered unresponsive statements, after which the judge ordered them stricken out and instructed the jury to disregard them.

STATEMENT

Petitioners Giallo, Valenti, and Juliano were charged, along with others, in the first count of an indictment returned in the United States District Court for the Southern District of New York with a conspiracy to commit offenses against the United States in violation of certain liquor control statutes under Title 26, United States Code (R. I, 13–15). In the second count petitioner Juliano was charged, along with others, with possession of an unregistered still in violation of 26 U. S. C. 2810 (R. I, 15). The jury found all three petitioners guilty under count one, but was unable to agree on count two as to petitioner Juliano (R. I, 133, 134). Petitioners Giallo and

Valenti were sentenced to imprisonment for five years (R. I, 9–10), and petitioner Juliano was sentenced to imprisonment for 18 months under count one (R. I, 10). On appeals from the convictions (R. I, 164–167), the judgments were affirmed by the Court of Appeals, one judge dissenting (R. II, 260).

The evidence may be summarized as follows:

On February 15, 1950, treasury agents, armed with a search warrant, discovered a still on a farm owned by petitioner Juliano (R. II, 240–246).

Juliano had purchased the farm in 1946 but was unsuccessful in its operation and moved his family to New Berlin, New York, in September 1949 (R. II, 40–42, 45). According to Juliano's testimony, he being the only one of the petitioners who testified, during the first week of December, 1949 he returned to the farm and rented the barn and house for $65 per month to a stranger who gave him a card bearing the name "Giollanno Trucking" (R. II, 51–55). Juliano testified that on February 11, 1950 he returned to the farm to pick up some of his tools, met there a man named Frank and another man who could not speak English, and slept there that night. Juliano also stated that during the five months prior to that date he had returned to the farm four or five times to "pick up some of [his] belongings." (R. II, 46–49.)

Defendant Di Lorenzo, who was charged under

count one and pleaded not guilty but whose case was severed (R. II, 22), testified that in June 1949 he had a conversation at the Academy Wire Products Company in Pelham, New York, with petitioners Giallo and Valenti. Valenti told Di Lorenzo, a used car dealer, they wanted to buy a Ford truck to "carry a heavy load of sugar", and Di Lorenzo obtained the truck for them. (R. II, 2–5.) The man whom Giallo and Valenti presented as the person in whose name the truck was to be registered introduced himself as Giollanno, but was really the defendant Bosco (R. II, 5–6). In July 1949, and about six times thereafter, Di Lorenzo purchased from Giallo and Valenti untaxed alcohol which was delivered by defendant Schick in the same truck Di Lorenzo had procured (R. II, 8–9, 10–13, 28).

In September 1949 Bosco, introducing a partner as Giollanno, rented a garage from one Roschitsch for parking the truck at Kingston, New York (R. I, 67–71). Government agents had observed the truck on numerous occasions transporting sugar from New York City to Kingston, and making trips to Juliano's farm (R. I, 20–21). A search warrant was obtained on February 14, 1950, and on February 15 government agents seized property used in the operation of a still at the farm, and certain receipts in Juliano's desk and jacket for items which could be used at a still (R. II, 240–246; R. I, 21–22).

ARGUMENT

1. Petitioners complain (Pet. 9–22) that the trial judge revealed an attitude partial toward the Government and adverse to defense witnesses and counsel, and committed reversible error by reason of his cross-examination of witnesses and remarks during the trial.

A reading of the entire record, however, discloses that the judge with courtesy and patience sought to ferret out the truth by cross-examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. The judge properly refused to sit back as a mere moderator or umpire presiding over a game of forensic skill. His questions were perhaps more numerous than they might have been if a more experienced counsel had tried the case for the Government. But neither the mere number of questions asked, nor the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution, spelled improper, partial advocacy on the part of the judge. It is submitted that he acted within the bounds of permissible discretion in conducting the trial, and that no reversible error resulted. Cf. *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Aaron*, 190 F. 2d 144, 146 (C. A. 2), certiorari denied *sub nom. Friedus* v.

United States, 342 U. S. 827; *United States* v. *Breen* 96 F. 2d 782, 784 (C. A. 2), certiorari denied, 304 U. S. 585; *Simon* v. *United States*, 123 F. 2d 80, 83 (C. A. 4), certiorari denied, 314 U. S. 694; *Todorow* v. *United States*, 173 F. 2d 439, 448 (C. A. 9), certiorari denied, 337 U. S. 925; *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), certiorari denied, 333 U. S. 857.[2]

Particular criticism is directed against alleged partisan cross-examination of petitioner Juliano by the trial judge. While it is true that the result of some of this questioning was to cast doubt on Juliano's credibility, the questions were put in proper and fair form for the purpose of testing credibility for the benefit of both the jury and the judge. Some of the questioning complained of (R. I, 84–87, 99–100) had been previously covered in Juliano's direct examination (R. II, 51, 52–54, 80–81), and much of it (R. I, 105, 108, 120–122, 122–123) was on relatively inconsequential mat-

[2] The broad, basic principles outlined in the cases we have cited are in general accord with those cited by petitioners (see Pet. 5) as conflicting with the decision below. In this kind of situation each case must be decided upon its own particular facts, and petitioners' cited cases involve much more active participation by the trial judge than here. Moreover, in some of them other errors, such as improper instructions to the jury, were important additional factors in contributing to the reversals. *E. g.*, *Adler* v. *United States*, 182 Fed. 464, 473–474 (C. A. 5); *Hunter* v. *United States*, 62 F. 2d 217, 220 (C. A. 5); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *United States* v. *Brandt*, 196 F. 2d 653, 656–657 (C. A. 2).

ters. The judge told the jury that while Juliano impressed him as a rather alert young man, it was for them to determine this question (R. I, 109). The judge's impartial attitude, moreover, was shown by numerous rulings in favor of the defense during the course of Juliano's testimony (*e. g.*, R. II, 62, 70, 82, 83, 89–90, 95, 115, 155, 164, 165, 167).[3]

There is no merit to the contention that the judge's rulings served to "rehabilitate" the convict Di Lorenzo, who was a government witness. There was no undue restriction of his cross-examination when he was pressed to divulge all the circumstances of his admitted manslaughter conviction to show that the death involved occurred during the illegal operation of a still (R. II, 17–19). Since Di Lorenzo had already admitted connection with illegal liquor traffic both with petitioners and on other occasions (R. II, 1, 12, 16), it is difficult to perceive how the jury's knowledge of details of his prior bootlegging with others could have substantially affected his credibility as a witness. He had, moreover, admitted that the manslaughter conviction resulted from the operation of a still (R. II, 18), and since the circumstances of this prior conviction were collateral to the case, the judge acted within his discretion in limiting further inquiry.

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[3] Other parts of the record also disclose rulings by the judge favorable to, and assisting, the defense in the presentation of its case (R. I, 52, 55, 63, 69, 72).

On cross-examination Di Lorenzo denied that he was guilty of the conspiracy charges in the indictment. The judge then asked if the witness meant he had nothing to do with the operation of the still, but was just a customer. (R. II, 35–36.) The answer was in the affirmative, this being in effect a repetition of Di Lorenzo's previous testimony that his dealings with Giallo and Valenti were limited to selling them a truck and buying some alcohol. But the judge's question could hardly be said to rehabilitate Di Lorenzo, for the witness, in answering, repeated a prior admission of acts from which the jury could have inferred that he actually was an accomplice to the conspiracy whose evidence should be received with great caution (see R. I, 136), despite his protestations of innocence.

Neither can it be said that the challenged remarks by the judge to defense counsel, considered either separately or cumulatively, constituted reversible error. Some of the statements by the judge related to proper trial procedure, *e. g.*, that counsel should object to improper questions before, not after, they were answered (R. I, 19–20); that the judge, not counsel, should make rulings on evidence and instruct the witnesses (R. I, 25–26, 76); that if counsel in the future would ask questions in ill-advised form to draw undesirable answers, he would have to take the consequences (R. I, 58–59); and that counsel should not attempt to have his witness contradict

his own testimony (R. I, 92–93). Other mildly impatient remarks by the judge were induced in large measure by apparently impertinent and provocative tactics employed by defense counsel (R. I, 40–41, 97; see also R. II, 239).[4]

2. Petitioners Giallo and Valenti urge that their counsel's motion for a mistrial should have been granted by reason of voluntary, allegedly prejudicial testimony by the witness Gianatasio, an agent of the Alcoholic Tax Unit (Pet. 23–26). The contention, however, is without merit.

On cross-examination, after Gianatasio stated that petitioner Valenti was only about eight feet away when he went to a restaurant with Bosco, the witness volunteered the statement, "Because I figured he might know me." On motion of Valenti's counsel, the judge ordered this remark stricken out but he did not think it necessary to admonish the witness although requested to do so. (R. I, 48.) Clearly there was no error here, and the majority below thought the point did "not seem at all important" (R. II, 249). Cf. *Hagans* v. *United States*, 170 F. 2d 141, 142 (C. A. 5).

Later on cross-examination Gianatasio made the voluntary statement that he told petitioner Giallo that "the reason [he] wasn't arresting him was because he was out on bail——." The following then occurred (R. I, 50–51):

[4] It should be noted that the judge also rebuked government counsel for improper trial tactics. See, *e. g.*, R. II, 7; R. I, 119–120.

Mr. CHAPMAN. I am going to move for a mistrial if we have any more of the voluntary statements, your Honor.

The COURT. Mr. Chapman, don't address the Court that way.

Mr. CHAPMAN. No. I, naturally——

The COURT. Don't address the Court that way.

Mr. CHAPMAN. I wasn't addressing your Honor in any way, but you can understand my rancor.

The COURT. Mr. Ginanatasio——

The WITNESS. Yes, sir?

The COURT. —don't make any statements of that nature again.

Stricken from the record and the jury are instructed to disregard them and erase them from their minds.

Go ahead. Next question.

Mr. CHAPMAN. I think, for the record, I ought to move for a mistrial because the witness has twice volunteered statements not responsive to any questions, and serving to prejudice my client.

The COURT. I don't regard that as prejudicial.

Mr. CHAPMAN. Your Honor will overrule it?

The COURT. The jury will erase anything from their minds that I have stricken from the record.

Mr. CHAPMAN. That is a very, sometimes, a very hard thing to do.

The COURT. We will ask the jurors now,

Do any of you feel you cannot erase that from your mind, or any of you feel that that remark which I have ordered stricken from the record would prejudice you in any way in the fair consideration of the guilt or innocence of any of these defendants?

The jury have all indicated in the negative. Your motion is denied.

Mr. CHAPMAN. Exception.

By Mr. Chapman:

Q. As a matter of fact, Mr. Giallo and Mr. Valenti were not arrested in this case until some time in the spring of 1951, is that right? A. After the indictment was handed down.

Mr. CHAPMAN. Can you give us the date of that, Mr. Schaefer?

The COURT. March 29, 1951.

Mr. CHAPMAN. That is right.

This incident is a good illustration of the manner in which petitioners endeavor by exaggeration to build up a charge of prejudicial misconduct. The rebuke to counsel was no stronger than the rebuke to the witness. The judge acted promptly in directing the jury to disregard the remark. The ensuing colloquy was occasioned by counsel's attempt to make a big issue of a minor matter. It is, we submit, clear that the judge acted within his sound discretion in denying the motion for a mistrial after carefully instructing the jury to disregard the voluntary statement of the witness. Cf. *United States* v. *Kushner,* 135

F. 2d 668, 674 (C. A. 2), certiorari denied, 320 U. S. 212; *United States* v. *Salli*, 115 F. 2d 292, 294 (C. A. 2); *United States* v. *Curzio*, 179 F. 2d 380 (C. A. 3); *Hilliard* v. *United States*, 121 F. 2d 992, 998–999 (C. A. 4), certiorari denied, 314 U. S. 627; *Claunch* v. *United States*, 155 F. 2d 261, 263 (C. A. 5); *Cavness* v. *United States*, 187 F. 2d 719, 722 (C. A. 9), certiorari denied, 341 U. S. 951.

CONCLUSION

The trial was properly conducted by the judge, and no question is raised which merits further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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